

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDUARDO MARTINEZ-TULL : CIVIL ACTION
v. :
: :
CARLOS M. GONZALEZ-ALEMAN : NO. 06-4102

M E M O R A N D U M

DUBOIS, J.

NOVEMBER 1, 2006

Plaintiff, a prisoner, has filed a pro se 42 U.S.C. § 1983 civil rights lawsuit against Carlos M. Gonzalez-Aleman, Esq. for failing to file a notice of appeal in plaintiff's criminal case. Plaintiff seeks monetary relief.

With his complaint, plaintiff filed a request for leave to proceed in forma pauperis, which will be granted. However, the complaint will be dismissed as legally frivolous pursuant to 28 U.S.C. § 1915(e), for the reasons which follow.

I. STANDARD OF REVIEW

The standard under which a district court may dismiss an action as frivolous under 28 U.S.C. § 1915(e) was clarified by the Supreme Court in Neitzke v. Williams, 490 U.S. 319 (1989). Dismissal under § 1915(e) is appropriate both when the action is "based on an indisputably meritless legal theory" and when it posits "factual contentions [that] are clearly baseless." Id. at 327.

II. DISCUSSION

In order to bring suit under § 1983, the plaintiff must allege in the complaint that a person acting under color of state law deprived him of his constitutional rights. Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir. 1993) (listing elements of

a § 1983 claim). The complaint filed in this case does not allege or even suggest that the defendant, Carlos M. Gonzalez-Aleman, Esquire, acted under color of state law with respect to plaintiff's claim. On this issue, the Court notes that an attorney representing an illegal alien in immigration-related proceedings does not act under color of state law. Thus, plaintiff has failed to state a cognizable federal claim under 42 U.S.C. § 1983.

This ruling is without prejudice to plaintiff's right to file suit against defendant for breach of contract and related claims in state court or, if the parties are citizens of different states and the amount in controversy is in excess of \$75,000.00, exclusive of interest and costs, in federal court under 28 U.S.C. § 1332, which provides for diversity of citizenship jurisdiction.

III. CONCLUSION

Because plaintiff has advanced an "indisputably meritless legal theory," Neitzke, supra at 327, the action is dismissed as legally frivolous pursuant to 28 U.S.C. § 1915(e).

An appropriate order follows.

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O R D E R

AND NOW, this 1st day of November, 2006, having considered plaintiff's complaint and motion to proceed in forma pauperis, **IT IS ORDERED** that:

1. Plaintiff's motion for leave to proceed in forma pauperis is **GRANTED**;
2. Plaintiff's complaint is **DISMISSED** as legally frivolous pursuant to 28 U.S.C. § 1915(e) for the reasons stated in the accompanying Memorandum. This Order is **WITHOUT PREJUDICE** to plaintiff's right to file suit against defendant for breach of contract and related claims in state court or, if the parties are citizens of different states and the amount in controversy is in excess of \$75,000.00, exclusive of interest and costs, in federal court under 28 U.S.C. § 1332, which provides for diversity of citizenship jurisdiction;
3. Plaintiff, Eduardo Martinez-Tull, #53612-066 shall pay filing fee of \$350 pursuant to 28 U.S.C. § 1915. The Warden or other appropriate official at the Fort Dix Federal Correctional Institution, or at any other prison at which plaintiff may be confined, shall deduct an initial partial filing fee of \$16.90 from plaintiff's inmate account, when such funds become available, and forward such funds to the Clerk, U.S. District

Court for the Eastern District of Pennsylvania, 601 Market Street, Room 2609, Philadelphia, PA, 19106 to be credited to Civil Action No. 06-4102;

4. The Warden or other appropriate official at the Fort Dix Federal Correctional Institution shall, after the initial partial filing fee is paid, deduct from plaintiff's inmate account, each time that plaintiff's account exceeds \$10, an amount no greater than 20 percent of the money credited to his account during the preceding month and forward that amount, to be credited to Civil Action No. 06-4102, to the address shown above, until the full filing fee is paid; and

5. The Clerk of Court is directed to send a copy of this order to the Warden of the Fort Dix Federal Correctional Institution.

BY THE COURT:

/s/ Jan E. DuBois, J.
JAN E. DUBOIS, J.